

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DANIEL KEATING-TRAYNOR on
behalf of himself and all others similarly
situated;

Plaintiffs,

vs.

AC SQUARE INC.; COMCAST INC.;
AFSHIN GHANEH; ANDREW
BAHMANYAR; AND DOES 1-60
INCLUSIVE;

Defendants.

Case No. CV-08-3035-MHP

**STIPULATION AND [PROPOSED]
ORDER TO ALLOW COMCAST, INC. TO
FILE ITS MOTION TO DISMISS
PLAINTIFF'S COMPLAINT PRIOR TO
THE INITIAL CASE MANAGEMENT
CONFERENCE**

Honorable Marilyn H. Patel

Plaintiff Daniel Keating-Traynor, by and through his attorney, Daniel Berko, and
Defendant Comcast, Inc. ("Comcast") by and through its attorneys Morgan, Lewis and Bockius
LLP, hereby stipulate as follows:

RECITALS

A. On June 20, 2008, the Court set the Initial Case Management Conference in this
action for September 23, 2008. See Docket No. 2 (Case No. CV-08-3035-MHP).

1 B. On July 9, 2008, Defendants AC Square, Ghaneh, and Bahmanyar filed Motions to
2 Dismiss Plaintiff's First, Second, Third, Fourth, and Fifth Causes of Action from Complaint, Case
3 Number CV-08-3035-EDL (a consolidated action that was removed to this Court on June 20,
4 2008). See Docket Nos. 1, 6-14 (Case No. CV-08-3035-MHP).

5 C. On July 10, 2008, Plaintiff served Comcast with the Summons and Complaint in
6 this action.

7 D. On July 16, 2008, the Court ordered Case No. CV-08-2907 and Case No. CV-08-
8 3035 related. See Docket No. 16 (Case No. CV-08-3035-EDL).

9 E. On July 17, 2008, Case No. CV-08-3035-EDL was reassigned to the Honorable
10 Judge Marilyn H. Patel.

11 F. On July 18, 2008, Defendants AC Square, Ghaneh, and Bahmanyar filed Ex Parte
12 Applications for Orders Allowing Defendants to File and Have Heard Motions to Dismiss
13 Pursuant to FRCP 12(b)(6) Prior to Initial Case Management Conference in Case No. CV-08-
14 3035. See Docket Nos. 17-19 (Case No. CV-08-3035-MHP).

15 G. On July 24, 2008, the Court granted Defendants AC Square, Ghaneh, and
16 Bahmanyar filed Ex Parte Applications for Orders Allowing Defendants to File and Have Heard
17 Motions to Dismiss Pursuant to FRCP 12(b)(6) Prior to Initial Case Management Conference.
18 The Court further set the hearing on the motions for September 8, 2008 and ordered that the
19 motions be filed no later than July 28, 2008, any opposition be filed no later than August 11,
20 2008, and any reply be filed no later than August 18, 2008. See Docket No. 20 (Case No. CV-08-
21 3035-MHP).

22 G. On July 25, 2008, Defendants AC Square, Ghaneh, and Bahmanyar filed their
23 Motion to Dismiss. See Docket Nos. 21-23 (Case No. CV-08-3035-MHP).

24 H. Federal Rule of Civil Procedure 12(a)(1)(A)(i) requires a defendant to file an
25 answer to a complaint within 20 days after being served, and that Federal Rule of Civil
26 Procedure, Rule 12(b) allows a defendant to serve a motion to dismiss in lieu of an answer. The
27 parties further agree that absent a Court Order allowing for an exception, Standing Order Number
28 4 prevents Defendant from filing the accompanying motion to dismiss until after the Initial Case

1 Management Conference on September 23, 2008.

2 **TERMS OF STIPULATION**

3 1. The parties jointly request that the Court allow Comcast to have its motion to
4 dismiss heard before the Initial Case Management Conference set for September 23, 2008 (Case
5 No. CV-08-3035-MHP).

6 2. Defendant's motion seeks dismissal of Plaintiff's Complaint, in its entirety,
7 without leave to amend. Should the Court decide to dispose of Plaintiff's claims against Comcast
8 prior to the Initial Case Management Conference, Comcast could avoid incurring legal fees and
9 costs by not having to file an answer or make initial disclosures.

10 3. The parties recognize that this Court granted on July 24, 2008 an *ex parte* motion
11 the other defendants brought for this same purpose in this action, and believe it should not be
12 necessary to burden the Court with another such motion.

13 4. Based on the foregoing and in the interest of judicial economy, the parties agree
14 that Defendant should be allowed to file its motion at the earliest possible stage of this litigation.

15 IT IS SO STIPULATED.

16 Dated: July 30, 2008

LAW OFFICES OF DANIEL BERKO

17
18 By /s/ Daniel Berko
19 Daniel Berko
20 Attorneys for Plaintiff
Daniel Keating-Traynor

21
22 Dated: July 30, 2008

MORGAN, LEWIS & BOCKIUS LLP

23
24 By /s/ Daryl S. Landy
25 Daryl S. Landy
26 Attorneys for Defendant
27 COMCAST INC.
28

1 **IT IS SO ORDERED** that:

2 The parties' request to allow Defendant to file the attached Motion to Dismiss Plaintiff's
3 Complaint is granted. Defendant shall file and serve the motion by no later than
4 _____, 2008. The hearing on this motion is set for September, 2008, at 2:00 p.m.
5 Any opposition to the motion shall be filed and served by _____, 2008. Any
6 reply to the opposition shall be filed and served by _____, 2008.

7
8
9 Dated: _____

By: _____
United States District Court Judge

EXHIBIT A

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Attorneys for Defendant
COMCAST INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DANIEL KEATING-TRAYNOR on
behalf of himself and all others similarly
situated,

Plaintiffs,

vs.

AC SQUARE INC.; COMCAST INC.;
AFSHIN GHANEH; ANDREW
BAHMANYAR; and DOES 1-60
inclusive,

Defendants.

Case No. CV-08-3035-MHP

**DEFENDANT COMCAST INC.'S NOTICE
OF MOTION AND MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

FRCP RULE 12(B)(6)

Date: September 8, 2008
Time: 2:00 p.m.
Courtroom: 15
Judge: Honorable Marilyn H. Patel

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 8, 2008, at 2:00 p.m., or as soon thereafter as
the matter may be heard in Courtroom 15 of the above-entitled Court, located at 450 Golden Gate
Avenue, San Francisco, California 94102, Defendant Comcast Inc. (hereinafter "Comcast" or

1 “Defendant”) will and hereby moves this Court to dismiss Plaintiff Daniel Keating-Traynor’s
 2 (“Plaintiff”) Complaint against Comcast, pursuant to Federal Rule of Civil Procedure 12(b)(6).

3 Plaintiff’s First Claim for Conspiracy to Violate Business and Professions Code Section
 4 17200 fails to state a claim upon which relief can be granted because Plaintiff did not, and cannot,
 5 state a claim showing the formation and operation of a conspiracy. Plaintiff’s Second Claim for
 6 Violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (hereinafter “FLSA”) and
 7 Third Claim for Conspiracy to Violate the FLSA both fail to state a claim upon which relief can
 8 be granted because his claims are barred by the maximum three-year statute of limitations. In
 9 addition, Plaintiff’s Fourth Claim for Failure to Pay Monies at Termination and Fifth Claim for
 10 Conspiracy to Violate Labor Code Section 558 are also time-barred. Leave to amend would be
 11 futile because the allegations in Plaintiff’s Complaint conclusively demonstrate that Plaintiff
 12 would not be able to state viable claims under these theories.

13 This motion is based on this Notice of Motion and Motion, the Memorandum of Points
 14 and Authorities, the Request for Judicial Notice, and the pleadings and papers previously filed

15 MORGAN, LEWIS & BOCKIUS LLP
 16 DARYL S. LANDY
 17 ANN MARIE REDING

18 Dated: _____

19 By _____
 20 Daryl S. Landy
 21 Attorneys for Defendant
 22 COMCAST INC.

EXHIBIT B

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Attorneys for Defendant
COMCAST INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DANIEL KEATING-TRAYNOR on
behalf of himself and all others similarly
situated;

Plaintiffs,

vs.

AC SQUARE INC.; COMCAST INC.;
AFSHIN GHANEH; ANDREW
BAHMANYAR; AND DOES 1-60
INCLUSIVE;

Defendants.

Case No. CV-08-3035-MHP

**DEFENDANT COMCAST INC.'S
REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF ITS MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

FRCP RULE 12(B)(6)

Date: September 8, 2008
Time: 2:00 p.m.
Courtroom: 15
Judge: Honorable Marilyn H. Patel

In accordance with the Federal Rule of Evidence 201, Defendant Comcast Inc.
("Defendant" or "Comcast") respectfully requests that this Court take judicial notice of each of
the exhibits accompanying this Request for Judicial Notice.

Federal Rule of Evidence 201 allows a court to take judicial notice of facts that are "not
subject to reasonable dispute in that [they are] either (1) generally known within the territorial

1 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to
2 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

3 Accordingly, Defendant asks this Court to take judicial notice of the following exhibits, all of
4 which are copies of pleadings and papers filed with the Superior Court of the State of California,
5 County of San Mateo:

6 1. Attached hereto and incorporated herein by reference as Exhibit A is a true and
7 correct copy of the Complaint in Daniel Joseph Keating-Traynor v. AC Square, Inc., Case No.
8 CIV 456118, filed in the Superior Court of the State of California, County of San Mateo, on July
9 7, 2006.

10 2. Attached hereto and incorporated herein by reference as Exhibit B is a true and
11 correct copy of the Complaint in Daniel Joseph Keating-Traynor on behalf of himself and all
12 others similarly situated v. AC Square, Inc., Case No. CIV 464114, filed in the Superior Court of
13 the State of California, County of San Mateo, on June 29, 2007.

14 3. Attached hereto and incorporated herein by reference as Exhibit C is a true and
15 correct copy of the Complaint in Daniel Joseph Keating-Traynor on behalf of himself and all
16 others similarly situated v. AC Square, Inc.; Comcast Inc.; Afshin Ghaneh; Andrew Bahmanyar,
17 Case No. CIV 473571, filed in the Superior Court of the State of California, County of San
18 Mateo, on June 10, 2008.

19 4. Attached hereto and incorporated herein by reference as Exhibit D is a true and
20 correct copy of the Order Consolidating Related Actions CIV 464144 and CIV 473571, signed by
21 Judge Mittlesteadt of the Superior Court of the State of California, County of San Mateo, on June
22 18, 2008.

23 MORGAN, LEWIS & BOCKIUS LLP
24 DARYL S. LANDY
ANN MARIE REDING

25 Dated: _____

26 By _____
27 Daryl S. Landy
28 Attorneys for Defendant
COMCAST INC.

EXHIBIT A

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Attorneys for Plaintiff
DANIEL JOSEPH KEATING-TRAYNOR

ENDORSED FILED
SAN MATEO COUNTY

JUL 07 2006

Clerk of the Superior Court
~~by Jordan Maxwell~~
DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

DANIEL JOSEPH KEATING-TRAYNOR,

Case No.:

CW 456118

Plaintiff,

**COMPLAINT FOR DAMAGES AND
DEMAND FOR JURY TRIAL**

v.

AC SQUARE, INC., a California
corporation, Does 1-20,

Defendants,

PARTIES

1. Plaintiff is informed and believes that Defendant AC SQUARE, INC. is and at all times mentioned in this Complaint was a California corporation, with the principal place of business located in Burlingame, San Mateo County, California.

2. Plaintiff is ignorant of the true names and capacities of Defendants Does 1 through 20, and therefore sues these Defendants in such fictitious names. Plaintiff will pray leave of this Court to amend this complaint to allege the true identities when ascertained.

3. Plaintiff is informed and believes and alleges that each of the defendants herein was at all relevant times the agent, employee, representative, partner, sub-contractor, joint venturer of the remaining defendants and acting within the course and scope of that relationship. Plaintiff is further informed and believes that each of the Defendants herein gave consent to, ratified, and otherwise authorized the acts alleged herein to each of the remaining Defendants.

STATEMENT OF FACTS

1
2 4. Plaintiff DANIEL KEATING-TRAYNOR, a resident of San Francisco County, began
3 working on or around December 1, 2004 for Defendants pursuant to an oral agreement as a trainee
4 installation technician providing cable television and computer services to Comcast consumers
5 throughout the Bay Area, including San Francisco, San Mateo and Santa Clara Counties. Plaintiff was
6 not paid by AC SQUARE, INC. for two months while in this training period.

7 5. Subsequent to his successful completion of the training program and having undertaken and
8 passed an employment skills test, Plaintiff was hired as a permanent full-time employee of AC
9 SQUARE, INC. pursuant to a written employment contract on or around January 30, 2005. Plaintiff
10 was paid on a "piece work" basis, with varying rates for installations, disconnects, upgrades, and
11 other similar services.

12 6. However, Plaintiff was not paid at a time and one-half rate for work in excess of 8 hours per
13 day. Plaintiff was also not paid for his travel time from one locale to another, including when he was
14 required to commute beyond 8 hours per day.

15 7. Plaintiff was required to use his own vehicle and other personal items of his, including tools,
16 a safety belt, and non-conductive ladder (for climbing utility poles) in order to perform the essential
17 duties of Defendant's business.

18 8. Plaintiff was not reimbursed for gas, cellphone bills, parking tickets, or vehicle maintenance
19 and damage (such as when a golf ball broke his truck's windshield).

20 9. Additionally, Defendant AC SQUARE, INC. improperly deducted the cost of tools and other
21 items from Plaintiff's wages, including an industry-specific cable crimping tool and a Nextel radio.

22 10. Defendant AC SQUARE, INC. also deducted from Plaintiff's wages costs it alleged to have
23 incurred as a result of lost equipment, including modems and cable television boxes (for as much as
24 \$360.00 per item), including for such equipment that was negligently and unintentionally mislaid while
25 at a consumer's residence and also for equipment which had in fact been returned to the Inventory
26 Clerk.
27

11. Defendant AC SQUARE, INC. also charged back to Plaintiff's wages for jobs that were alleged by the Comcast's Quality Controllers to have not been completed or alleged to have been inadequately performed, such as disconnects that may have been reconnected by the consumer. In all cases, the chargebacks were in the sum of \$50.00, a sum far larger than that payable by Defendant to Plaintiff. (For instance, a disconnect for example was paid at a \$5.00 piece rate.)

12. Plaintiff KEATING-TRAYNOR complained about these deductions and chargebacks to his wages and was retaliated against by being given the less remunerative piece work orders, such as disconnects, resulting in even lower income to him. For example, Plaintiff complained on or about April 30, 2005 regarding a deduction of \$360.00 from his wages payable for the period of April 10-23, 2005.

13. On or about May 2, 2005, Defendant again retaliated against Plaintiff DANIEL KEATING-TRAYNOR by terminating him. Plaintiff at that time had accrued wages. Said wages have not been forthcoming despite demand therefor, and no accounting has been given.

FIRST CAUSE OF ACTION
[Non-Payment of Wages]

14. Plaintiff incorporates by reference paragraphs 1-13 above, as though fully set forth herein.

15. Pursuant to Labor Code § 201, at the time Defendant terminated Plaintiff's employment Defendant was obligated to pay Plaintiff wages earned and unpaid. In violation of Labor Code § 201 and despite demand, Defendant failed and continues to refuse to pay Plaintiff. Because Plaintiff was employed on a piece work basis and Defendant has failed and refused to provide the accounting required by law for his last two days of work, Plaintiff is only able to estimate the sum he is owed. Plaintiff estimates this to be \$400.00.

16. In addition, Defendant violated Labor Code minimum wage statutes when it failed to pay him during his training period (between December 1, 2004 and January 30, 2005). Plaintiff estimates this to be approximately 80 hours during the month of December 2004 and January 2005.

17. Plus, Defendant improperly charged back expenses from Plaintiff's wages and owes those now

1 as wages violating Labor Code § 222.

2 18. Pursuant to Labor Code § 218.5, Plaintiff requests that the Court award Plaintiff reasonable
3 attorney's fees and costs incurred in this action.

4 19. Pursuant to Labor Code § 218.6, Plaintiff requests that the Court award Plaintiff interest on
5 all due and unpaid wages, at the legal rate specified by Civil Code § 3289(b), accruing from the date
6 the wages were due and payable.

7 20. The Defendant's failure to pay wages was willful in that Defendant knew that Plaintiff was
8 owed wages, thus entitling Plaintiff to penalties under Labor Code §§ 203, which provides that an
9 employee's wages shall continue as a penalty until paid or for a period of up to 30 days from the time
10 they were due, whichever period is shorter.

11
12 WHEREFORE, Plaintiff prays for judgment as hereinafter described.

13 **SECOND CAUSE OF ACTION**
14 **[Failure to Pay Overtime Wages]**

15 21. Plaintiff incorporates by reference paragraphs 1-20 above, as though fully set forth herein.

16 22. During the period of from January 30, 2005 through May 2, 2005, Plaintiff never was paid
17 any wages for the time he worked in excess of eight hours.

18 23. Labor Code § 1198 provides that it is unlawful to employ persons for longer than the hours
19 set by the Industrial Welfare Commission or under conditions prohibited by the applicable wage
20 order.

21 24. At all times relevant herein, Industrial Welfare Commission Wage Order No. 9-2001 (8 Cal.
22 Code Reg. § 11090) and Labor Code § 510(a) applied to Plaintiff's employment by Defendant and
23 provide for employees employed for more than 8 hours a day or 40 hours in one week are supposed
24 to be paid at the rate of time and one-half for hours in excess of 40 in one week.

25 25. Under the provisions of the Wage Order referred to in Paragraph 24, Plaintiff estimates that
26 he should have received time and one-half for piece work in excess of 8 hours per day on as many
27 as two days per week for the period between January 30, 2005 and May 2, 2005. Plaintiff is informed

1 and believes Defendant owes him a sum in an amount of at least \$200.00, representing the difference
2 between the amount of wages owed pursuant to the Wage Order and the amount actually paid to
3 Plaintiff. Defendants have failed and refused and continues to fail and refuse to pay Plaintiff the
4 amount owed.

5 26. Defendant's failure to pay Plaintiff for overtime rates on piece work jobs, as required by the
6 applicable Wage Order, violates the provision of Labor Code § 1198 and is therefore unlawful.

7 27. Pursuant to Labor Code § 1194(a), Plaintiff requests that the court award Plaintiff reasonable
8 attorney's fees and costs incurred by him in this action.

9 28. Pursuant to Labor Code § 558(a)(1), Plaintiff requests a civil penalty of \$50 for the seven pay
10 periods Plaintiff was underpaid for a total of \$350.00.

11 29. The Defendant's failure to pay wages was willful in that Defendant knew the Plaintiff was
12 owed wages, thus entitling Plaintiff to penalties under Labor Code § 203, which provides that an
13 employee's wages shall continue as a penalty until paid or for a period of up to 30 days from the time
14 they were due, whichever period is shorter.

15 WHEREFORE, Plaintiff prays for judgment as hereinafter described.

16 **THIRD CAUSE OF ACTION**
17 **[Violations of Labor Code § 2802]**

18 30. Plaintiff incorporates by reference paragraphs 1-29 above, as though fully set forth herein.

19 31. While employed in the customary business of Defendants AC SQUARE, INC. and in the
20 direct consequence of the discharge of his duties, Plaintiff was required to expend his own monies
21 and in addition suffered losses to his own property for which Defendants must indemnify Plaintiff,
22 including but not limited to the purchase of a vehicle, vehicle maintenance, gas, tools, and equipment,
23 including safety belt and non-conductive ladder in a sum greater than \$3,618.23, to be proven at Trial,
24 all necessarily for conducting Defendant's business of cable television/computer installation.
25 Defendant has failed and refused to reimburse Plaintiff for such expenses, despite demand.

26 32. Pursuant to Labor Code § 2802, Plaintiff is entitled to indemnification for his necessarily
27 incurred expenses, plus interest from the date on which the expense was occurred, plus reasonable
28

costs and attorney's fees in recovering said sums.

WHEREFORE, Plaintiff prays for judgment as hereinafter described.

FOURTH CAUSE OF ACTION
[Wrongful Termination in Violation of Public Policy]

33. Plaintiff incorporates by reference paragraphs 1-32 above, as though fully set forth herein.

34. Defendant retaliated against Plaintiff by terminating him because he demanded wages to which he is entitled from Defendant.

35. Such retaliation and discharge violates public policy of California according to Gould v. Maryland Sound Indust. Inc., (1996) 31 Cal.App.4th 1137, 1150 and Labor Code § 98.6. Demanding wages and reporting violations of wage law to management is a fundamental policy of this state. Id.

36. As a result of the aforesaid acts of Defendant, Plaintiff has become mentally upset, distressed, and aggravated. Plaintiff claims general damages for such mental distress and aggravation, in an amount to be determined later, and special damages to be ascertained for the cost of treatment to relieve such injuries.

37. Defendant's act of discharge herein was malicious, fraudulent and oppressive, with the wrongful intention of injury Plaintiff, and Defendant acted with an improper and evil motive amounting to malice, and in conscious disregard of Plaintiff's rights; Plaintiff requests punitive damages in a sum to be ascertained.

38. Plaintiff requests that the court award Plaintiff reasonable attorney's fees and costs incurred by him in this action.

WHEREFORE, Plaintiff prays for judgment as hereinafter described.

FIFTH CAUSE OF ACTION
[Failure to Provide Personnel File, Copies and an Itemized Statement]

39. Plaintiff incorporates by reference paragraphs 1-38 above, as though fully set forth herein.

40. On October 25, 2005, Plaintiff requested to see his employment file and get copies, pursuant to Labor Code §§ 226(b), 432 and 1198.5.

41. Defendant AC SQUARE, INC. failed and refused to provide Plaintiff access to his file, nor has it responded to this request, violating Labor Code §§ 226(e), 226(f), 226.3, 433 and 1199(c).

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For general damages in a sum to be ascertained;
2. For special damages, including compensatory damages for past lost wages, overtime pay, reimbursement of all improper deductions and chargebacks made, reimbursement for all expenses necessarily incurred by Plaintiff in the discharge of his duties for employer, in a sum to be ascertained;
3. For interest on the lost wages and overtime pay;
4. For penalties in the amount of 30 days pay for Plaintiff, pursuant to Labor Code § 203;
5. For additional civil penalties under Labor Code § 558(a)(1) totaling \$350.00 and Labor Code § 226(e), 226(f) and 226.3 in amounts to be proven at Trial;
6. For attorney's fees in a sum to be ascertained pursuant to Labor Code §§ 218.5, 226(e), 1194 and 2802(c);
7. For exemplary or punitive damages;
8. For costs of suit herein incurred; and,
9. For such other further relief as the Court may deem proper.

DEMAND FOR JURY TRIAL

Plaintiff DANIEL JOSEPH KEATING-TRAYNOR hereby demands trial by jury.

DATED: June 28, 2006

LAW OFFICES OF BRUCE R. BERNSTEIN

BY: 

BRUCE R. BERNSTEIN
Attorneys for Plaintiff

DANIEL KEATING-TRAYNOR

EXHIBIT B

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11 111111 ^N1:

PAGE 02

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5 Attorneys for Plaintiffs,
 6 DANIEL KEATING-TRAYNOR on behalf of himself
 7 and all others similarly situated

FILED
 SAN MATEO COUNTY

JUN 29 2007

Clerk of the Superior Court
 By **GEORGE JACKSON**
 DEPUTY CLERK

8
 9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 10 IN AND FOR THE COUNTY OF SAN MATEO
 11 UNLIMITED JURISDICTION

12 DANIEL KEATING-TRAYNOR on
 13 behalf of himself and all others similarly
 14 situated,

15 Plaintiffs,

16 vs.

17 AC SQUARE, DOES 1 THROUGH 600,
 18 inclusive.

19 Defendants.

Case No.

CV 7464144

COMPLAINT FOR RESTITUTION,
 DAMAGES AND INJUNCTIVE
 RELIEF

CLASS ACTION

19 Plaintiff DANIEL KEATING- TRAYNOR complains of Defendants and each of them as
 20 follows:

21 1. Plaintiff is informed and believes and thereupon alleges that Defendant AC
 22 SQUARE, INC. and Does 1 through 600 install, disconnect, and upgrade cable television and
 23 computer services to consumers who use the services and equipment of Comcast, a provider of
 24 cable television and computer services to consumers throughout California.

25 2. Plaintiff does not know the true names of Defendants DOES 1 through 600 inclusive,
 26 and therefore sues them by those fictitious names. Plaintiff is informed and believes, and on
 27 the basis of that information and belief alleges, that each of those defendants was in some
 28 manner legally responsible for the events, happenings, injuries and damages alleged in this
 COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

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PAGE 03

complaint.

1
2 3. In this complaint, when reference is made to any act of AC SQUARE, INC.
3 (hereafter "AC") such allegations shall mean that the owners, officers, directors, agents,
4 employees or representatives, of AC authorized, ratified, approved such acts, or negligently
5 failed and omitted to supervise its employees and agents while engaged in the management,
6 direction, operation or control of the affairs of the business organization and did so while
7 acting within the course and scope of its employment or agency.

8 4. Plaintiff brings this action on his own behalf, and on behalf of all persons similarly
9 situated. The class plaintiff represents consists of all persons who were employed by AC as
10 cable television and computer technicians and who install, upgrade, disconnect and provide
11 similar services to consumers who use the services and equipment of Comcast. Plaintiff
12 KEATING worked as a technician and his job included the responsibilities to install, upgrade,
13 disconnect and provide similar services to consumers who use the services and equipment of
14 Comcast. Plaintiff was formerly employed by AC as a cable television and computer technician
15 for the purpose of installing, upgrading, disconnecting and providing similar services to
16 consumers who use the services and equipment of Comcast.

17 5. There are well-defined common of questions of law and fact affecting the class
18 Plaintiffs represent. The class members' claims against Defendants involve questions of common
19 and general interest in that each and every class member worked as an installer of cable
20 television and computer services to consumers who use the services and equipment of Comcast,
21 were not paid for overtime, were paid on a piecemeal basis, did not receive rest breaks and meal
22 breaks as required by California law, had the cost of tolls and other items deducted from their
23 wages, were not reimbursed for gas, cellphone bills, parking tickets or vehicle maintenance or
24 damage all of which involved or occurred while working for AC. In addition, AC failed to pay
25 each class member wages during all hours that they worked. Accordingly, the facts supporting
26 the claim for each class member is identical or substantially similar for Plaintiff and each
27 member of the class and the alleged breach and claim of liability is identical or substantially
28 identical for each member of the class. These questions are such that proof of a state of facts
COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

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PAGE 04

1 common to the class representatives and to members of the class will entitle each member of the
2 class to the relief requested in this complaint.

3 6. Plaintiff will fairly and adequately represent the interests of the class, because
4 plaintiff is a member of the class and plaintiff's claims are typical of those in the class.

5 **FIRST CAUSE OF ACTION**

6 **(VIOLATION OF BUSINESS AND PROFESSIONS CODE §17200)**

7 7. Plaintiff incorporates herein *in haec verba* all of the allegations, averments, and
8 matters contained in paragraphs 1 through 6 above.

9 8. Business and Professions Code §17200 et seq. prohibits any business from
10 engaging in unfair competition which it defines as any unlawful, unfair or fraudulent business act
11 or practice and unfair, deceptive, untrue or misleading advertising including any act prohibited by
12 Business and Professions Code §17500.

13 9. AC'S refusal to pay class members the wages due to them, improper deductions from
14 class members' paychecks, and its refusal to pay overtime due are each separately and
15 collectively unfair and unlawful business practices.

16 10. Each class member is entitled to restitution of all money in which they have an
17 ownership interest which constitutes either (1) the failure to pay wages due or (2) the failure to
18 pay overtime due or (3) the failure to pay for time spent while employed by AC.

19 11. Plaintiff and the class are entitled to an Order or Injunction, prohibiting Defendant from
20 continuing to engage in the conduct alleged here.

21 **SECOND CAUSE OF ACTION**

22 **(VIOLATION OF LABOR CODE 2802)**

23 12. Plaintiff incorporates by reference all of the allegations, averments and matters
24 contained in paragraph 1 through 6 inclusive as if set forth at length herein *in haec verba*.

25 COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF
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PAGE 01

13. While employed in the customary business of AC and in the direct consequence of their duties, class members were required to expend his or her own monies in direct consequence of the discharge of his or her duties, and in addition suffered losses to his or her own property for which Defendants must indemnify class members, including, but not limited to the purchase of a vehicle, vehicle maintenance, gas, tools, and equipment, including safety belts and other equipment.

THIRD CAUSE OF ACTION
(FAILURE TO PAY OVERTIME WAGES)

14. Plaintiff incorporates by reference all of the allegations, averments and matters contained in paragraph 1 through 6 inclusive as if set forth at length herein *in haec verba*.

15. AC fails and refuses to pay class members overtime for time worked in excess of eight hours per day or forty hours per week.

16. Labor Code 1198 provides that it is unlawful to employ persons for longer than the hours set by the Industrial Welfare Commission or under conditions prohibited by the applicable wage order.

17. At all times relevant herein, the Industrial Welfare Commission Wage Order No. 9-2001 (8 Cal. Code Reg. 11090) and Labor Code 510(a) applied to the employment of class members by Defendant. Said wage order and Labor Code section provide that any employee employed for more than 8 hours a day or 40 hours per week are to be paid at the rate on 1.5 times the normal hourly rate for hours in excess of 8 per day or 40 per week, and or double time under certain conditions.

18. Pursuant to Labor Code 1194(a), Plaintiffs are entitled to reasonable attorney's fees and costs.

19. Pursuant to Labor Code 558(a)(1), each class member is entitled to a civil penalty of

COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

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PAGE 03

\$50 for the initial work period that each class member was underpaid and \$100 for each successive period pay period that he or she was not paid overtime wages as required by law.

FOURTH CAUSE OF ACTION

(FAILURE TO FURNISH INFORMATION REQUIRED BY LABOR CODE 226)

20. Plaintiff incorporates by reference all of the allegations, averments and matters contained in paragraph 1 through 6 inclusive as if set forth at length herein *in haec verba*.

21. Defendant has willfully refused to semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, and (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one

22. Each class member is entitled to a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.

FIFTH CAUSE OF ACTION

(ON BEHALF OF DANNY KEATING-TRAYNOR INDIVIDUALLY)

(FAILURE TO PAY WAGES DUE)

23. Plaintiff incorporates herein all of the allegations, averments and matters contained in paragraphs 1- 3 above as if set forth at length *in haec verba*.

24. Plaintiff worked as a trainee for approximately 80 hours for which he was not paid. He is entitled to at least minimum wage plus any overtime for those hours.

COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

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WHEREFORE PLAINTIFFS PRAY JUDGMENT AS FOLLOW:

ON ALL CAUSES OF ACTION:

1. General damages according to proof
2. Special damages according to proof;
3. Interest on all sums awarded;
4. Costs of suit;
5. Such other, and/or further relief as is just and proper.

Dated: June 28, 2007

DANIEL BERKO
Attorney for Plaintiff DANNY TRAYNOR-
KEATING on behalf of themselves
and all those similarly situated


COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

EXHIBIT C

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FILED
SAN MATEO COUNTY

JUN 10 2008

Clerk of the Superior Court
By  DEPUTY CLERK

D/B/b

8 Attorneys for Plaintiffs,
9 DANIEL KEATING-TRAYNOR on behalf of himself
10 and all others similarly situated

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE COUNTY OF SAN MATEO
14 UNLIMITED JURISDICTION

15 DANIEL KEATING-TRAYNOR on)
16 behalf of himself and all others similarly)
17 situated,)
18 Plaintiffs,)
19 -vs-)
20 AC SQUARE, INC.; COMCAST INC.;)
21 AFSHIN GHANEH; ANDREW)
22 BAHMANYAR; and DOES 1-60)
23 inclusive,)
24 Defendants.)

Case No.

CIV 473571
COMPLAINT FOR RESTITUTION,
DAMAGES AND INJUNCTIVE
RELIEF

CLASS ACTION

25 Plaintiff DANIEL KEATING-TRAYNOR complains of Defendants and each of them as
26 follows:

27 1. Plaintiff is informed and believes and thereupon alleges that Defendants AC
28 SQUARE, INC., COMCAST INC, AFSHIN GHANEH, ANDREW BAHMANYAR and Does 1
through 60 employ cable technicians who install, disconnect, and upgrade cable television and
computer services to consumers who use the services and equipment of Comcast, a provider of
cable television and computer services to consumers throughout California.

2. Plaintiff does not know the true names of Defendants DOES 1-60 inclusive, and
therefore sues them by those fictitious names. Plaintiff is informed and believes, and on the basis
of that information and belief alleges, that each of those defendants was in some manner legally

- 1 -

COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

1 responsible for the events, happenings, injuries and damages alleged in this complaint. Plaintiff
2 is informed and believes and thereupon alleges that each of the Does 1-60 and all named
3 Defendants encouraged, supported, aided, advised, agreed upon and abetted the violations that
4 are alleged in this complaint.

5 3. In this complaint, when reference is made to any act of AC SQUARE, INC.
6 (hereafter "AC") such allegations shall mean that the owners, officers, directors, agents,
7 employees or representatives, of AC authorized, ratified, approved such acts, or negligently
8 failed and omitted to supervise its employees and agents while engaged in the management,
9 direction, operation or control of the affairs of the business organization and did so while acting
10 within the course and scope of its employment or agency.

11 4. In this complaint, when reference is made to any act of COMCAST, INC.
12 (hereafter "COMCAST") such allegations shall mean that the owners, officers, directors, agents,
13 employees or representatives, of COMCAST authorized, ratified, approved such acts, or
14 negligently failed and omitted to supervise its employees and agents while engaged in the
15 management, direction, operation or control of the affairs of the business organization and did so
16 while acting within the course and scope of its employment or agency.

17 5. Defendant AFSHIN GHANEH is responsible for the payroll and business practices of
18 AC Square that are alleged herein. Afshin Ghaneh also owns AC Square. Defendant ANDREW
19 BAHMANYAR is also responsible for the payroll and business practices of AC Square that are
20 alleged herein.

21 6. Defendant Comcast conspired with and aided and abetted Defendants AC Square,
22 Afshin Ghaneh and Andrew Bahmanyar and Does 1 through 60 in taking the actions alleged
23 herein. moreover, by shifting responsibility for the installation of Comcast equipment to AC
24 Square and knowingly allowing AC to systematically underpay its cable technicians including
25 plaintiff and all class members, COMCAST was able to unfairly compete in the market place by
26 reducing the true costs of installing and servicing its equipment through the use of laborers paid
27 less than lawful wages.

28 7. Defendant COMCAST, Afshin Ghaneh and Andrew Bahmanyar and Does 1 through 60

1 aided, abetted, encouraged, supported, advised and benefited from AC Square's violation of
2 California and federal wage and hour laws as alleged herein. In addition, Afshin Ghaneh has
3 diverted to himself funds that should have been and were available to pay Plaintiff and all AC
4 Square employees a lawful wage.

5 8. Plaintiff brings this action on his own behalf, and on behalf of all persons similarly
6 situated. The class plaintiff represents consists of all persons who were employed by AC as
7 cable television and computer technicians and who install, upgrade, disconnect and provide
8 similar services to consumers who use the services and equipment of Comcast. Plaintiff
9 KEATING worked as a technician and his job included the responsibilities to install, upgrade,
10 disconnect and provide similar services to consumers who use the services and equipment of
11 Comcast. Plaintiff was formerly employed by AC Square as a cable television and computer
12 technician for the purpose of installing, upgrading, disconnecting and providing similar services
13 to consumers who use the services and equipment of Comcast

14 9. There are well-defined common of questions of law and fact affecting the class
15 Plaintiffs represent. The class members' claims against Defendants involve questions of common
16 and general interest in that each and every class member (1) worked as an installer of cable
17 television and computer services to consumers who use the services and equipment of Comcast,
18 (2)(a) were not paid for overtime either when he worked more than an 8 hour day, 2(b) or more
19 than a forty hour week 2(c) worked the seventh day in a row 2(d) worked over eight hours on the
20 seventh day, (3) were paid on a piecemeal basis, (4) did not receive rest breaks or meal breaks as
21 required by California law, (5) were subject to improper deductions from their wages, and (6)
22 were not reimbursed for gas, cell phone bills, parking tickets, and vehicle expenses including,
23 but not limited to, insurance, vehicle repairs or vehicle maintenance or damage to their vehicles
24 which involved work done for and/ or occurred while working for AC. In addition, (7) AC failed
25 to pay each class member wages during all hours that they worked. In addition, (8) AC
26 intentionally failed to pay all wages due when employees left the company. (9) Class members
27 were not paid for split shifts as required by law. (10) AC required employees and all class
28 members do work for no pay under various circumstances such as 10(a) staff meetings, 10(b)

1 picking up work orders and equipment, and 10(c) trips to customer locations where no customer
 2 was present so as to allow an employee/class member to perform services for which he came to
 3 the customer's location (except for payment of a \$1.00 fee). In addition, (11) AC failed to
 4 provide information required to be on wage stubs under California law to all class members. (12)
 5 In addition, AC and all other defendants failed to pay Plaintiffs for time spent transporting
 6 COMCAST Equipment. Accordingly, the facts supporting the claim for each class member is
 7 identical or substantially similar for Plaintiff and each member of the class and the alleged breach
 8 and claim of liability is identical or substantially identical for each member of the class. These
 9 questions are such that proof of a state of facts common to the class representatives and to
 10 members of the class will entitle each member of the class to the relief requested in this
 11 complaint.

12 10. Plaintiff will fairly and adequately represent the interests of the class, because plaintiff
 13 is a member of the class and plaintiff's claims are typical of those in the class.

14 **FIRST CAUSE OF ACTION**

15 **(CONSPIRACY TO VIOLATE BUSINESS AND PROFESSIONS CODE §17200)**

16 11. Plaintiff incorporates herein *in haec verba* all of the allegations, averments, and
 17 matters contained in paragraphs 1-10 above.

18 12. Business and Professions Code §17200 et seq. prohibits any business from engaging in
 19 unfair competition which it defines as any unlawful, unfair or fraudulent business act or practice
 20 and unfair, deceptive, untrue or misleading advertising including any act prohibited by Business
 21 and Professions Code §17500.

22 13. AC Square's refusal to pay class members the wages due to them as alleged herein,
 23 which conduct was done in concert and pursuant to agreement with Comcast, Afshin Ghaneh and
 24 Andrew Bahmanyar, employees at Comcast, others, and Does 1 through 60, and which was
 25 aided, abetted, ordered, supported and encouraged by all defendants, and its improper deductions
 26 from class members' paychecks, are each separately and collectively unfair and unlawful
 27

1 business practices.

2 14. Each class member is entitled to restitutionary damages which constitutes (1) the
3 failure to pay wages due or (2) the failure to pay overtime due or (3) the failure to pay for time
4 spent while employed by AC or (4) the failure to reimburse for expenses or (5) the failure to pay
5 a split shift or show up premium when required by law and (6) all other failures to pay money
6 due. Moreover, to the extent that Defendants, and any of them, received greater profits from their
7 business than they otherwise would have had AC obeyed California Labor Laws, Defendants
8 must disgorge all such profits to the extent necessary to pay Plaintiffs the money owed to them.
9

10 15. Plaintiff and the class are entitled to an Order or Injunction, prohibiting Defendants from
11 continuing to engage in the conduct alleged here.
12

13 **SECOND CAUSE OF ACTION**
14 **(VIOLATION OF FAIR LABOR STANDARD ACT)**
15 **(AGAINST ALL DEFENDANTS)**

16 16. Plaintiff incorporates herein all of the allegations, averments and matters contained in
17 paragraphs 1-10 and 12-15, inclusive as if set forth at length herein *in haec verba*.

18 17. AC Square, Comcast, Afshin Ghaneh, Andrew Bahmanyar and Does 1 through 60 fail to
19 pay overtime to class members even though it is clear that class members are entitled to overtime
20 for each workweek that they work over 40 hours in a week.
21

22 18. AC Square, Comcast, Afshin Ghaneh and Andrew Bahmanyar's failure to pay overtime
23 due to class members was a willful violation of the Fair Labor Standards Act (FLSA), because it
24 would be impossible for Defendants not to be aware that the class members were not exempt
25 from overtime requirements and yet they failed to pay overtime and continue to fail to pay
26 overtime through the present time.
27

28 19. Because all Defendants willfully failed to comply with the FLSA, all Plaintiffs are

entitled to damages consisting of the overtime wages they should have been paid and liquidated damages in an amount equal to the unpaid overtime plus interest at the legal rate and reasonable attorney's fees incurred in enforcing the rights.

THIRD CAUSE OF ACTION

(CONSPIRACY TO VIOLATE THE FAIR LABOR STANDARD ACT) (AGAINST ALL DEFENDANTS)

20. Plaintiff incorporates herein all of the allegations, averments and matters contained in paragraphs 1-10, 12-15 and 17-19, inclusive as if set forth at length herein *in haec verba*.

21. Defendants and each of them combined together in a tacit and express agreement to knowingly and intentionally deprive Plaintiff and all class members of their rights to overtime pay as provided by the FLSA.

FOURTH CAUSE OF ACTION

(FAILURE TO PAY MONIES DUE AT TERMINATION OF EMPLOYMENT)

22. Plaintiff incorporates herein all of the allegations, averments and matters contained in paragraphs 1-10, 12-15, 17-19 and 21, inclusive as if set forth at length herein *in haec verba*.

23. Defendant AC Square, as to all class members who no longer work for it, willfully failed to pay all monies due at the termination of the employment relationship either immediately or within 72 hours.

24. Each class member who is no longer employed by AC Square is entitled to thirty day's wages in addition to all other relief.

FIFTH CAUSE OF ACTION

(CONSPIRACY TO VIOLATE LABOR CODE SECTION 558) (AGAINST ALL DEFENDANTS)

25. Plaintiff incorporates herein all of the allegations, averments and matters contained in paragraphs 1-10, 12-15, 17-19, 21, 23-24 inclusive as if set forth at length herein *in haec verba*.

26. Labor Code section 558 provides that any employer or other person acting on behalf of

1 the employer, who violates or causes to be violated any provision of chapter of the Labor Code
2 regulating payment of wages or any provision regulating hours and days of work and any order of
3 the Industrial Welfare Commission shall be liable for \$50.00 penalty for the first violation of the
4 first pay period as to any employee and \$100.00 for each subsequent violation for each
5 subsequent pay period for which the employee was underpaid in addition to an amount sufficient
6 to recover underpaid wages. Wages recovered under section 558 are the property of the
7 underpaid employee.

8 27. By engaging in the conduct and omissions alleged herein, Defendants have intentionally
9 violated numerous provisions of IWC wage orders and statutes resulting wages including but not
10 limited to all those referenced in this complaint.

11 28. Each class member and each employee is entitled to all wages due to them pursuant to
12 Labor Code §558.

13 29. Because the violations of the wage orders and Labor Code provisions relating to payment
14 of wages was intentional, and Defendants knowingly took advantage of its employees and caused
15 them substantial economic harm, Plaintiffs are entitled to punitive damages against all
16 Defendants.
17

18 **WHEREFORE PLAINTIFF PRAYS JUDGMENT AS FOLLOW:**

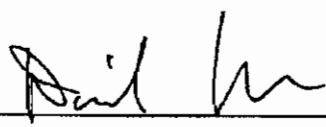
19 **ON ALL CAUSES OF ACTION:**

- 20 1. General damages according to proof;
21 2. Special damages according to proof;
22 3. Interest on all sums awarded;
23 4. Costs of suit;
24 5. Such other, and/or further relief as is just and proper.
25

26 **ON THE FIFTH CAUSE OF ACTION:**
27

6. Punitive Damages according to proof.

Dated: June 9, 2008



DANIEL BERKO, Attorney for Plaintiff
DANNY KEATING-TRAYNOR, on behalf of themselves
and all those similarly situated

EXHIBIT D

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Attorneys for Defendant
AC SQUARE, INC.

ENDORSED FILED
SAN MATEO COUNTY

JUN 19 2008

Clerk of the Superior Court
By Siolo S. Sala
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

DANIEL KEATING-TRAYNOR, on
behalf of himself and all others similarly
situated,

Plaintiffs,

v.

AC SQUARE, DOES 1 THROUGH 600,
inclusive,

Defendants.

Case No. CIV 464144

CLM
**[PROPOSED] ORDER CONSOLIDATING
RELATED ACTIONS CIV 464144 AND CIV
473571**

Date: June 18, 2008
Time: 4:00 p.m.
Dept.: 1
Honorable Carol L. Mittlesteadt

DANIEL KEATING-TRAYNOR, on
behalf of himself and all others similarly
situated,

Plaintiffs,

v.

AC SQUARE, INC.; COMCAST INC.;
AFSHIN GHANEH; ANDREW
BAHMANYAR; and DOES 1 THROUGH
60, inclusive,

Defendants.

Case No. CIV 473571

FOR GOOD CAUSE SHOWN the action entitled *Daniel Keating-Traynor, on behalf of himself and all other similarly situated, Plaintiffs vs. AC Square, Inc.; Comcast, Inc.; Afshin Ghaneh; Andrew Bahmanyar; and Does 1 through 60 inclusive, Defendants*, San Mateo County Superior Court number CIV 473571, filed June 10, 2008 is hereby consolidated for all purposes with

Case No. CIV 464144

ORDER CONSOLIDATING RELATED ACTIONS NO. CIV 464144 AND CIV 473571

1 the action entitled *Daniel Keating-Traynor, on behalf of himself and all other similarly situated,*
2 *Plaintiffs, vs. AC Square, Inc., Does 1 through 600 inclusive, Defendants,* San Mateo County
3 Superior Court number CIV 464144, filed June 29, 2007. All documents shall be filed under the
4 case number of the case filed first, case number CIV 464144.

5
6 Dated: JUN 18 2008

CAROL MITTLESTEADT

JUDGE OF THE SUPERIOR COURT

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EXHIBIT C

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16 Attorneys for Defendant
17 COMCAST INC.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 DANIEL KEATING-TRAYNOR on
16 behalf of himself and all others similarly
17 situated,

18 Plaintiffs,

19 vs.

20 AC SQUARE INC.; COMCAST INC.;
21 AFSHIN GHANEH; ANDREW
22 BAHMANYAR; and DOES 1-60
23 inclusive,

24 Defendants.

Case No. CV-08-3035-MHP

**DEFENDANT COMCAST INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT**

FRCP RULE 12(B)(6)

Date: September 8, 2008
Time: 2:00 p.m.
Courtroom: 15
Judge: Honorable Marilyn H. Patel

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This action consists of the consolidation of Plaintiff Daniel Keating-Traynor's ("Plaintiff") lawsuit filed on June 29, 2007 in San Mateo County Superior Court (No. CIV 464144), which does *not* name defendant Comcast Inc. ("Defendant" or "Comcast") and Plaintiff's lawsuit filed on June 10, 2008 in the same court (No. CIV 473571) against Comcast, defendant AC Square, Inc., and two individual defendants.¹ On June 18, 2008, these cases were consolidated (under case No. CIV 464144). (Request for Judicial Notice filed herewith, Ex. D, Order Consolidating Related Actions.) Subsequently AC Square and the individual defendants removed them to the Northern District on June 20, 2008. Plaintiff's June 10, 2008 Complaint alleges the following claims against Comcast: (1) Conspiracy to Violate Business and Professions Code Section 17200; (2) Violation of the Fair Labor Standards Act, 29 U.S.C. section 201, et seq. ("FLSA"); (3) Conspiracy to Violate the FLSA; (4) Failure to Pay Monies at Termination; and (5) Conspiracy to Violate Labor Code Section 558.

Plaintiff alleges that he was employed as a technician for AC Square, a company which employs technicians that install, disconnect, and upgrade cable television, computer and other electronic services to consumers who use Comcast's services and equipment. (Request for Judicial Notice, Ex. C, June 10, 2008 Complaint (No. 473571), ¶8.) Plaintiff further alleges that Comcast "conspired with and aided and abetted" AC Square and the individual defendants in the actions alleged in his Complaint. (*Id.* at ¶6.) In addition, Plaintiff has alleged in yet another action he filed that his employment was terminated on May 2, 2005. (Request for Judicial Notice, Ex. A, July 7, 2006 Complaint (No. CIV 456118), ¶13.)

As Comcast was not named in the June 29, 2007 action, it only seeks to dismiss the claims against it alleged in Plaintiff's June 10, 2008 Complaint. Specifically, Comcast seeks to dismiss Plaintiff's First Claim for Conspiracy to Violate Business and Professions Code section 17200

¹ For the Court's convenience, copies of the above-referenced Complaints filed in the Superior Court of California, County of San Mateo, are attached as Exhibit B (No. CIV 464144) and Exhibit C (No. CIV 473571) to the Request for Judicial Notice filed herewith.

1 because Plaintiff did not, and cannot, state a claim for conspiracy against Comcast. Comcast
 2 further seeks to dismiss Plaintiff's Second and Third Claims for Violation of the FLSA and
 3 Conspiracy to Violate the FLSA, respectively, because they are barred by the FLSA's maximum
 4 three-year statute of limitations. Finally, Comcast seeks to dismiss Plaintiff's Fourth Cause of
 5 Action for Failure to Pay Monies Due at Termination of Employment, and his Fifth Claim for
 6 Conspiracy to Violate Labor Code Section 558, because they are also time-barred. Accordingly,
 7 because all five claims against Comcast fail to state a claim upon which relief can be granted,
 8 Plaintiff's case against Comcast must be dismissed in its entirety without leave to amend.

9 **II. THE STANDARD FOR GRANTING A MOTION TO DISMISS**

10 Part or all of a complaint must be dismissed if it "fail[s] to state a claim upon which relief
 11 can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal is proper where the complaint's allegations,
 12 even if taken as true, would not entitle the plaintiff to recover as a matter of law. *Jacobs v. Block*,
 13 250 F.3d 729, 732 (9th Cir. 2001); *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th
 14 Cir. 1988). Here, as discussed below, Plaintiff's claims should be dismissed because they are
 15 defective on the face of the Complaint. Plaintiff's class action allegations for these claims should
 16 also be dismissed, because he has no standing to bring these claims on behalf of a class. *General*
 17 *Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) (holding persons without claims
 18 themselves cannot represent a class who may have claims).

19 **III. PLAINTIFF'S FIRST CLAIM FAILS TO STATE A CLAIM FOR CONSPIRACY** 20 **TO VIOLATE BUSINESS AND PROFESSIONS CODE SECTION 17200**

21 Plaintiff's First Claim alleges conspiracy to violate Business and Professions Code section
 22 17200. (Request for Judicial Notice, Ex. C., June 10, 2008 Complaint (No. CIV 473571) ¶¶11-
 23 15.) To state a claim for conspiracy, a plaintiff must allege: "(1) the formation and operation of a
 24 conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from
 25 such act or acts." *General American Life Ins. Co. v. Roma*, 769 F. Supp. 1121, 1125 (N.D. Cal.
 26 1991). "To establish the 'wrongful act' element of a civil conspiracy, defendant must satisfy all
 27 of the elements of a cause of action for some other tort or wrong." *Id.*

1 Importantly, “a simple failure to comply with statutory overtime requirements . . . does
 2 not qualify” to support a claim for conspiracy. *Reynolds v. Bement*, 36 Cal. 4th 1075, 1090
 3 (2005). This is because a conspiracy claim cannot be based on a contract cause of action. *Id.*
 4 Since a claim for overtime wages is a form of contract claim, it cannot support a conspiracy
 5 claim. *Hays v. Bank of America*, 71 Cal.App.2d 301, 305 (applying the FLSA and stating
 6 “federal cases have definitely determined that claims for such overtime wages...are not ex delicto
 7 or founded on tort, but on the contrary and they sound in contract.”) Accordingly, because
 8 Plaintiff’s Complaint contains only contract-based claims against Comcast for alleged failure to
 9 pay overtime, he cannot state a claim for conspiracy to violate Section 17200.

10 Moreover, Plaintiff has failed to state a claim showing the requisite formation and
 11 operation of a conspiracy. Plaintiff has not alleged and cannot allege Comcast owes him any duty
 12 which, if breached, would support his conspiracy claim. Absent such a duty, no conspiracy claim
 13 can be alleged. *Litton v. Saudi Arabia Ltd.*, 7 Cal. 4th 503, 520 (1994) (“the doctrine of
 14 conspiracy does not impose liability on persons who owe *no duty* to a plaintiff or who are
 15 otherwise immune from liability”). Therefore, Plaintiff’s First Claim should be dismissed
 16 without leave to amend.

17 **IV. PLAINTIFF’S SECOND CLAIM FOR VIOLATION OF THE FLSA IS TIME-**
 18 **BARRED**

19 In his Second Claim, Plaintiff purports to state a claim for violation of the FLSA.
 20 (Request for Judicial Notice, Ex. C., June 10, 2008 Complaint (No. CIV 473571), ¶¶ 16-19.)
 21 Under the FLSA, an action to recover unpaid overtime compensation is barred unless commenced
 22 within two years after the cause of action accrues, except where the violation of the Act was
 23 “willful,” in which case the action may be commenced within three years. 29 U.S.C. § 255.
 24 Under the FLSA, a cause of action for unpaid wages accrues each payday on which the wages
 25 due to an employee were not paid. *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986); *Biggs v.*
 26 *Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993).

27 In his original Complaint filed against defendant AC Square, Inc., Plaintiff alleged that his
 28 employment terminated on May 2, 2005. (Request for Judicial Notice, Ex. A, July 7, 2006

1 Complaint (No. CIV 456118, ¶13.)² Plaintiff did not file the instant lawsuit against Comcast until
 2 June 10, 2008, over three years after his termination. Accordingly, Plaintiff did not, and cannot,
 3 plead facts sufficient to state a claim for violation of FLSA because his claim is barred by the
 4 both the two-year and three-year statutes of limitations. Therefore, Plaintiff's Second Claim for
 5 violation of the FLSA should be dismissed.

6 **V. PLAINTIFF'S THIRD CLAIM FOR CONSPIRACY TO VIOLATE THE FLSA IS**
 7 **ALSO TIME-BARRED**

8 In his Third Claim, Plaintiff purports to state a claim for conspiracy to violate the FLSA.
 9 (Request for Judicial Notice, Ex. C., June 10, 2008 Complaint (No. CIV 473571), ¶¶20-21.) The
 10 applicable statute of limitations for a civil conspiracy claim is the statute of limitations for the
 11 underlying claim. *See Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 208 (9th Cir. 1991) (where
 12 fraud claim barred by applicable three-year statute of limitation, civil conspiracy claim based on
 13 fraud did not constitute actionable claim); *Risk v. Kingdom of Norway*, 707 F. Supp. 1159, 1170,
 14 n. 13 (N.D. Cal. 1989)(noting that liability is based on underlying tort committed in furtherance
 15 of conspiracy and applicable statute of limitations is that of underlying tort); *Maheu v. CBS, Inc.*,
 16 201 Cal. App. 3d 662, 673 (1988) (in "an action based on civil conspiracy, the applicable statute
 17 of limitations is determined by the nature of the action in which the conspiracy is alleged").
 18 Accordingly, the statute of limitations for Plaintiff's Third Claim for Conspiracy to Violate the
 19 FLSA is the same as the maximum three-year statute of limitations for his Second Claim for
 20 Violation of the FLSA. Therefore, like the Second Claim for violation of the FLSA above,
 21 Plaintiff's Third Claim is time-barred and must be dismissed.

22 **VI. PLAINTIFF'S FOURTH CLAIM FOR FAILURE TO PAY MONIES AT**
 23 **TERMINATION IS TIME-BARRED**

24 Plaintiff's Fourth Claim alleges "failure to pay monies at termination." (Request for
 25 Judicial Notice, Ex. C., June 10, 2008 Complaint (No. CIV 473571), ¶¶22-24.) Presumably,
 26 Plaintiff is alleging a violation of California Labor Code section 201, which provides that an

27 ² Admissions in the pleadings are generally binding on the parties and the Court *See American*
 28 *Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988).

employee's wages are due immediately upon termination of employment. Lab. Code § 201. The statute of limitations for an action for payment of wages due under Labor Code section 201 is three years. Cal. Code Civ. Proc. § 338(a); *Montecino v. Spherion Corp.*, 427 F. Supp. 2d 965, 967 (C.D. Cal. 2006); *Medrano v. D'Arrigo Bros. Co.*, 125 F. Supp. 2d 1163, 1170 (N.D. Cal. 2000). Accordingly, because Plaintiff did not file his lawsuit against Comcast until June 10, 2008, over three years after his May 2, 2005 termination, this claim also is untimely. Plaintiff did not, and cannot, plead facts sufficient to state a claim for failure to pay monies at termination, and his Fourth Claim should be dismissed.

VII. PLAINTIFF'S FIFTH CLAIM FOR CONSPIRACY TO VIOLATE CALIFORNIA LABOR CODE SECTION 558 IS ALSO TIME-BARRED

Plaintiff's Fifth Claim alleges conspiracy to violate California Labor Code section 558. (Request for Judicial Notice, Ex. C., June 10, 2008 Complaint (No. CIV 473571), ¶¶25-26.) Section 558 specifically provides for civil penalties: "Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work...shall be subject to civil penalty as follows..." Cal. Lab. Code § 558. Statutory penalties are subject to a one-year statute of limitations. Cal. Code Civ. Proc. § 340(a). Accordingly, any claim for penalties under section 558 must be brought within one year of the alleged violation. As stated above, Plaintiff was terminated on May 2, 2005, over three years before the filing of this action against Comcast. As a result, Plaintiff's Fifth Claim should be dismissed as barred by the applicable one-year statute of limitations.

VIII. ANY CLASS ALLEGATIONS BASED UPON PLAINTIFF'S CLAIMS SHOULD ALSO BE DISMISSED

Because Plaintiff cannot individually bring against Comcast his First Claim for Conspiracy to Violate Business and Professions Code Section 17200, his Second Claim for Violation of the FLSA, his Third Claim for Conspiracy to Violate the FLSA, his Fourth Claim for Failure to Pay Monies at Termination, and his Fifth Claim for Conspiracy to Violate Labor Code Section 558, as addressed above, he cannot represent a class of individuals who may have such claims. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) (holding persons

1 without claims themselves cannot represent a class who may have claims); *O'Shea v. Littleton*,
2 414 U.S. 488, 494 (1974) (same). Thus, the Court should dismiss not only Plaintiff's individual
3 claims, but also dismiss these claims brought against Comcast on behalf of the putative class.

4 **IX. CONCLUSION**

5 For all of the foregoing reasons, this Court should dismiss Plaintiff's Complaint in its
6 entirety, without leave to amend.

7 MORGAN, LEWIS & BOCKIUS LLP

8
9 Dated: _____

By _____
Daryl S. Landy
Attorneys for Defendant
COMCAST INC.

EXHIBIT D

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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 DANIEL KEATING-TRAYNOR on
16 behalf of himself and all others similarly
17 situated,

18 Plaintiffs,

19 vs.

20 AC SQUARE INC.; COMCAST INC.;
21 AFSHIN GHANEH; ANDREW
22 BAHMANYAR; and DOES 1-60
23 inclusive,

24 Defendants.

Case No. CV-08-3035-MHP

**[PROPOSED] ORDER GRANTING
DEFENDANT COMCAST INC.'S MOTION
TO DISMISS PLAINTIFF'S COMPLAINT**

Date: September 8, 2008
Time: 2:00 p.m.
Courtroom: 15
Judge: Honorable Marilyn H. Patel

25 WHEREFORE, on September 8, 2008, the Motion to Dismiss Plaintiff Daniel Keating-
26 Traynor's ("Plaintiff") Complaint filed by Defendant Comcast Inc. ("Defendant") came on for
27 regularly scheduled hearing in Courtroom Fifteen, the Honorable Judge Marilyn H. Patel
28 presiding. Daryl Landy of Morgan, Lewis & Bockius LLP appeared for Defendant and Daniel

1 Berko appeared for Plaintiff. Upon consideration of the pleadings, papers, and arguments of
 2 counsel, and with good cause shown, it is hereby **ORDERED AND ADJUDGED THAT:**

3 Defendant's Motion is **GRANTED**.

4 Plaintiff's First Claim is dismissed, without leave to amend, because Plaintiff did not, and
 5 cannot, state a claim showing the formation and operation of a conspiracy to which Comcast was
 6 a party. Absent any duty owed by Comcast, no conspiracy claim can be made. *Litton v. Saudi*
 7 *Arabia Ltd.*, 7 Cal. 4th 503, 520 (1994).

8 Plaintiff's Second Claim for Violation of the Fair Labor Standards Act, 29 U.S.C. section
 9 201, *et seq.* ("FLSA") is dismissed, without leave to amend, because it is time-barred by the
 10 FLSA's maximum three-year statute of limitations. 29 U.S.C. § 255.

11 Plaintiff's Third Claim is also dismissed, without leave to amend, because it is time-barred
 12 by the maximum three-year statute of limitations. *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203,
 13 208 (9th Cir. 1991) (holding applicable statute of limitations for a civil conspiracy claim is statute
 14 of limitations for underlying claim); *Risk v. Kingdom of Norway*, 707 F. Supp. 1159, 1170, n. 13
 15 (N.D. Cal. 1989) (same).

16 In addition, Plaintiff's Fourth Claim is dismissed, without leave to amend, because it is
 17 time-barred by the three-year statute of limitations for an action for payment of wages due under
 18 California Labor Code section 201. Cal. Code Civ. Proc. § 338(a); *Montecino v. Spherion Corp.*,
 19 427 F. Supp. 2d 965, 967 (C.D. Cal. 2006); *Medrano v. D'Arrigo Bros. Co.*, 125 F. Supp. 2d
 20 1163, 1170 (N.D. Cal. 2000).

21 Plaintiff's Fifth Claim is dismissed, without leave to amend, because it is time-barred by
 22 the applicable a one-year statute of limitations for penalties. Cal. Code Civ. Proc. §340(a).

23 Accordingly, Plaintiff's Complaint against Comcast is dismissed, in its entirety, without
 24 leave to amend.

25 **IT IS SO ORDERED.**

26 Dated: _____

By: _____
 United States District Court Judge

27 DB2/20782568.2